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IN THE

Supreme Court of the United States

No. 554 OCTOBER TERM, 1951

JOAO FREIRE SINEIRO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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JOAO FREIRE SINEIRO prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on November 27, 1951.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals are reported in 190 F. 2d 397 and
respectively.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 27, 1951 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C., §1254.

QUESTION PRESENTED

Whether a statement obtained from the appellant while in custody of the Immigration authorities, without the benefit to him of counsel and without any warning to him that he need not make any statement is in violation of the Fifth Amendment of the Constitution of the United States and inadmissible as evidence against him.

STATUTES INVOLVED

Fifth Amendment of the Constitution of the United States.

U. S. Code, Title 8, §180-a.

STATEMENT

Appellant was arrested on November 20, 1950 upon a warrant of arrest, charged with violation of the United States Code, Title 8, §180-a, in that the appellant had entered the United States without inspection by an Immigrant Inspector. He was arraigned before the United States Commissioner in Philadelphia the same day. In support of the Government's charge, Francis W. Braden, Esquire, of the Immigration and Naturalization Service in Philadelphia, testified from a statement taken from the appellant by an Investigator of the Immigration and Naturalization Service while he was under arrest in deportation proceedings. Preceding the statement given by the appellant was the following language (R. 7a): "Any statement which you might make must be voluntary on your part and may be used in any proceedings the Government may see fit to institute, whether civil or criminal." The appellant was taken into custody on September 12, 1950 and the statement was obtained two days later (R. 13a).

The statement of the appellant was offered in evidence and was objected to, as was the testimony of Mr. Braden based upon said statement on the ground that the appellant was not advised that he need not make any statement at all nor was he advised that he could consult counsel before making any statement. No other testimony was offered by the Government. The objections were overruled and the appellant was held in bail for removal proceedings to Baltimore, Maryland, which subsequently were effected. Thereupon, the appellant filed a motion to quash the warrant of arrest and suppress the use of the statement taken by and before the Investigating Officer of the Immigration and Naturalization Service on the following grounds: (1) That, at the time of the taking of the statement by the Investigating Officer of the Immigration and Naturalization Service, the appellant, although warned that any voluntary statement could be used against him in civil or criminal proceedings, was not advised that he could remain silent and need not make any statement. (2) That the appellant is of Portuguese nationality, with little, if any, knowledge of the English language and did not fully comprehend the nature of his rights under the law. (3) That the appellant was not afforded the right and assistance of counsel at the time of the taking of said statement. (4) That the said statement was introduced as evidence in the hearing before the United States Commissioner in violation of the Fifth Amendment of the Constitution of the United States. After argument, the motion was dismissed by the District Court of the Eastern District of Pennsylvania. The appellant appealed to the Circuit Court of Appeals for the Third Circuit. A motion to dismiss the appeal was filed by the Government on the ground that the order of the District Court was interlocutory in nature and not a final decision. This motion was dismissed by the Court of Appeals in an opinion rendered on July 19, 1951 (R. 21-26).

On October 16, 1951, the order of the District Court was affirmed (R. 28-30). Judgment was entered on November 27, 1951. The affirmance of the order was based by the Court on the authority of *United States vs. Mitchell*, 322 U.S. 65.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the statement obtained from the appellant was freely and voluntarily given or that it was understood by the appellant.
2. In holding that the appellant was adequately apprised of his constitutional rights before the statement was obtained.
3. In failing to hold that the appellant was not advised that he need not make any statement at all and that he could consult counsel before making any statement.
4. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

This is not an isolated case where a statement was improperly obtained by the Immigration authorities from a person detained by them. It is a practice which is followed generally in the Immigration and Naturalization Service (R. 16a) and should be condemned.

The appellant is of Portuguese nationality with little, if any, knowledge of the English language. He had no knowledge, nor did he comprehend the nature of his rights under the law. These facts are not in dispute. The sole question is whether he should have been advised that he need not make any statement at all and that he could consult counsel before making any statement.

The appellant was arrested on an immigration warrant on September 12, 1950. After being held in custody for two days, he was then questioned in connection with his arrival in this country, as to whether he had entered as a stowaway and whether he had entered without inspection. The Immigration Officers wanted to obtain sufficient facts to enable them to apply for a warrant of arrest under Title 8, §180-a, U.S. Code, charging the appellant with entering the United States without inspection by an Immigrant Inspector. Before questioning the appellant, he was informed that "any statement which you might make must be voluntary on your part and may be used in any proceedings the Government may see fit to institute, whether civil or criminal" (R. 13a). He was not advised that he need not make any statement at all, nor was he advised that he could consult with counsel prior to giving any statement. Not knowing the English language, not being advised of the rights which our Constitution grants to all persons in connection with any criminal accusation, being deprived of his liberty for two days and having no opportunity to see friends or counsel, it is not strange that the appellant should succumb to the oppressive surroundings and furnish the Immigration Officers with the information which they were seeking.

In an analogous case, *Petition of F*, 73 F. Supp. 655, the petitioner in his examination for naturalization had extracted from him an admission of adultery. Prior to his examination, the examiner said to the petitioner: "Any statement that you make must be voluntary. Any statement that you make can be used against you. Under these circumstances are you willing to be sworn and to testify?" The Court held that this was insufficient to warn a layman of his constitutional privilege against self-incrimination.

In *Wood v. United States*, 128 F. 2d 265, the defendants were convicted of robbery. Pleas of guilty, allegedly made

at the preliminary hearing in the police court, were admitted in evidence against them. The only question was whether this was proper. The record indicated that the defendants were not asked whether they desired counsel nor were they cautioned or informed concerning their rights. A plea of guilty or not guilty was demanded at such hearing and the Court did not inquire whether the accused had or wanted counsel or caution them that they need not plead or speak. There was no evidence of force or constraint beyond that involved in asking them to plead and receiving their responses without advice or caution. The record did not show that the defendants knew their rights. Neither was there any specific denial that they had such knowledge. In reversing the judgment, the Court said (on page 277) that the fairer practice would be to advise the accused in all cases, before permitting him to speak even as a volunteer, of his right to counsel and warn him that he need not speak and, if he does, it is at his peril. This would assure fairness to the accused and foreclose the possibility that he might act in ignorance. This privilege against self-incrimination, said the Court, stands guard "at any stage of the proceedings, preliminary or otherwise." (at page 279).

In obtaining the statement from the appellant in the instant case, the Investigating Officer of the Immigration and Naturalization Service failed to advise the defendant that he need not speak or make any statement or to advise him of his right to consult counsel before making any statement. This violated the provision of the Fifth Amendment of the Constitution of the United States against self-incrimination. The statement was therefore inadmissible in evidence at the preliminary hearing before the United States Commissioner.

This Court has condemned confessions obtained under such circumstances, apart from the question of the violation of the Fifth Amendment of the Constitution of the United

States. *McNabb vs. United States*, 318 U. S. 332. The questioning of the appellant in this case was such a "secret interrogation of persons accused of crime" as was referred to by this Court in the McNabb case and in *Upshaw vs. United States*, 335 U.S. 410, 412, 413. When such statements are usually obtained, no one, including counsel, is permitted by the Immigration authorities to confer with the accused (R. 16a). This creates an atmosphere of absolute isolation from the outside world and it was under such surroundings that the statement was obtained from the appellant. If the Immigration authorities desired to accuse the appellant of any crime, it was their duty to immediately and without delay bring the appellant before a United States Commissioner where he could be formally arraigned. This was not done.

In the case at bar, the lower Court relied upon *Mitchell vs. United States*, supra. However, the facts in this case are totally different from those in the Mitchell case. In the Mitchell case, the defendant promptly and spontaneously admitted his guilt within a few minutes after his arrival at the police station. Although the defendant was illegally held eight days, his confessions were found to have been made before any illegal detention had occurred. In commenting on the Mitchell case, this Court said in *Upshaw vs. United States*, supra, (page 413):

> "Thus the holding in the Mitchell case was only that Mitchell's subsequent illegal detention did not render inadmissible his prior confessions. They were held not to involve 'use by the Government of the fruits of wrongdoing by its officers.' The Mitchell case at p. 68, however, reaffirms the McNabb rule that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological . . .' "

In the instant case, the appellant was arrested under an Immigration warrant and was in custody for two days before the statement was obtained from him. A hearing was held on October 4, 1950 before the Immigration authorities, but no decision has been rendered to date. On the basis of the record, it would appear that the reason for detaining the appellant under the Immigration warrant was suspicion only and was "only to furnish an opportunity for a further interrogation" (*Upshaw v. United States*, supra). While this may be the usual practice by the Immigration and Naturalization Service, this Court held in *Upshaw vs. United States*, supra (p. 414), that a similar practice by police was in violation of the law, and confessions thus obtained were inadmissible under the McNabb rule.

The appellant should have been advised of his right to counsel and of his right to decline to make any statement, as was done by the Federal Bureau of Investigation Agent in *Iva Ikuko Toguri D'Aquino vs. United States*, 192 F. 2d 338, 355. Having admittedly failed to observe this cautionary warning, the statement obtained from the appellant by the Immigration Officer was clearly inadmissible.

The instant case, whether viewed in the light of the McNabb rule, or as a violation of the Fifth Amendment in that the appellant was compelled to give incriminatory evidence against himself, involves a practice uniformly followed by a Government Agency which should be strongly condemned.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Harry Polikoff,
Counsel for Petitioner.

Jacob J. Kilimnik,
Of Counsel.

January 26, 1952.

APPENDIX A.

FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. CODE, TITLE 8, §180-a:

"Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by Immigration Officials or eludes examination or inspection by Immigration Officials, or obtains entry to the United States by a wilfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or by both such and imprisonment." (Mar. 4, 1929, Ch. 690, #2, 45 Stat. 1551).

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In the Supreme Court of the United States

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No. 554

JOAO FREIRE SINEIRO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 28-30) is not yet reported.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1951 (R. 31). The petition for a writ of certiorari was filed on January 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] An earlier opinion of the Court of Appeals (R. 21-26) denying the Government's motion to dismiss petitioner's appeal is reported at 190 F. 2d 397 (C. A. 3).

QUESTION PRESENTED

While in custody in Philadelphia, Pennsylvania, under an administrative deportation warrant regularly issued, petitioner, an alien, made a signed, self-incriminating statement to an immigration agent concerning his entry into the United States. Subsequently, he was charged before a United States Commissioner in Baltimore, Maryland, with the offense of having illegally entered the United States, and a warrant for his arrest was issued by the Baltimore Commissioner. In a proceeding on this warrant under Rule 40(a), Federal Rules of Criminal Procedure, held before a United States Commissioner in Philadelphia, Pennsylvania, petitioner's self-incriminating statement was testified to and offered in evidence and the Commissioner held him to answer to the District Court in Maryland.

The question presented is whether petitioner is entitled, in an independent proceeding, to have his self-incriminating statement suppressed and the Baltimore warrant quashed because he was not expressly advised by the immigration agent that he had a right to remain silent and consult counsel, although before being questioned by the agent he was cautioned that any statement he might make must be voluntary and might be used against him in a civil or criminal proceeding.

STATEMENT

On September 12, 1950, petitioner was arrested in Philadelphia, Pennsylvania, on a deportation warrant charging that he was in the United States in violation of the Passport Act in that he had not presented an unexpired passport or other document, but had entered as a stowaway and without inspection (R. 13-14, 22). Two days later he was interrogated by an agent of the Immigration and Naturalization Service (Pet. 2) and gave a signed statement admitting that he had entered the United States illegally (R. 28).

On November 20, 1950, a warrant for the arrest of petitioner was issued by a United States Commissioner in Baltimore, Maryland, upon a complaint charging him with entering the United States without inspection by an immigration inspector.[2] On the same day, petitioner was arrested on this warrant and immediately arraigned before a United States Commissioner in Philadelphia. (R. 21-22, 28-29.) At this hearing, an official of the Immigration and Naturalization

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[2] 8 U. S. C. 180a: "Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or by both such fine and imprisonment."

Service testified, over the objection of petitioner's counsel, as to the statement previously made by petitioner after his arrest on the deportation warrant. The written statement was also offered in evidence. No other evidence was offered. (R. 15-16, 22.) The Commissioner held petitioner in $500 bail to answer to the District Court in Baltimore (R. 3, 29; see Rule 40(a), F.R. Crim. P).

On November 28, 1950, petitioner filed a motion in the District Court for the Eastern District of Pennsylvania to quash the warrant of arrest and to suppress the use of his statement (R. 2-3). After a hearing the following day, the District Court denied the motion (R. 29). Its order was affirmed by the Court of Appeals for the Third Circuit on November 27, 1951 (R. 28-31).

We are advised that meanwhile, on December 13, 1950, the United States Attorney in Baltimore filed an information charging petitioner with a violation of 8 U.S.C. 180a. Petitioner has not been arraigned on this information because of the pendency of the present proceeding.

ARGUMENT

Petitioner's sole contention here (Pet. 4), as in the courts below (see R. 5, 8, 29), is that his self-incriminating statement should have been suppressed and the Baltimore Commissioner's warrant quashed because he was not advised, be-

fore he made the statement, of his rights to counsel and to remain silent.

At the outset, it is to be noted that criminal proceedings against petitioner have not advanced beyond the stage of the filing of an information. Meanwhile, the deportation proceeding is still pending.[3] It is not at all certain that any attempt will be made to use the statement in the criminal prosecution, if it is pressed.[4] And even if the statement should be offered in proof of the criminal charge, petitioner will have the same right to object and to preserve his objection for appellate review in the event he should be convicted.[5] Hence, it would seem that petitioner's motion to suppress was premature.

In any event, we think the courts below were right in holding that there was no transgression of petitioner's rights in the manner in which he was interrogated by the immigration agent following his arrest on the deportation warrant. At the out-

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[3] A hearing was held on the deportation warrant on October 4, 1950 (Pet. 8), and we are advised that the matter is now pending before the Commissioner for decision.

[4] See the statement of Francis W. Braden, who represented the Immigration and Naturalization Service at the hearing on petitioner's motion (R. 13): "* * * in the statement that is at issue here, it will never be used, in all probability, at the trial of this man, if and when he comes to trial, because direct testimony will be furnished at the trial."

[5] See the statement of the District Court below (R. 9): "You still have the right to object to anything further when the matter comes to trial and in the proper forum. * * *"

set of the interrogation petitioner was cautioned in the following words (R. 29):

> You are informed that I am an officer of the United States Immigration and Naturalization Service * * * I desire to take a statement from you * * * Any statement which you make must be voluntary on your part and may be used in any proceedings the Government may see fit to institute, whether civil or criminal. Are you willing to make such a statement freely and voluntarily under oath?

It is true that petitioner was not advised in so many words that he need not speak at all. He was, however, advised that any statements that he might make must be voluntary and might be used against him. This, in itself, was an obvious caution that any statement forthcoming must be of petitioner's own free will and without compulsion. The question which followed, "Are you willing to make such a statement freely and voluntarily under oath," plainly advised petitioner that he was not required to answer any questions or make any statement at all. These cautions and petitioner's willingness freely to make his sworn statement unquestionably imply, not only that he knew he was not required to speak unless he so desired, but that he was, despite that knowledge, willing to answer the agent's questions. Accordingly, in view of the absence of any evidence that petitioner did not

understand the plain meaning of these words when translated into his own language, his contention is without merit.[6]

Moreover, the cases uniformly hold that while the Government may practice no deception, fraud, or duress upon an accused in order to obtain evidence, it is not required to advise him of his constitutional privilege against self-incrimination, and a statement, otherwise voluntary, will not be rendered inadmissible by the mere failure to so apprise him. *Powers* v. *United States,* 223 U.S. 303, 314; *Wilson* v. *United States,* 162 U.S. 613, 623; *Hanson* v. *United States,* 186 F. 2d 61, 64-65 (C.A. 8); *United States* v. *Freeman,* 167 F. 2d 786, 790-791 (C.A. 7), certiorari denied, 335 U.S. 817; *Pulford* v. *United States,* 155 F. 2d 944, 947-948 (C.A. 6); *United States* v. *Klinger,* 136 F. 2d 677, 678 (C.A. 2), certiorari denied, 320 U.S. 746; *United States* v. *Block,* 88 F. 2d 618, 620 (C.A. 2), certiorari denied, 301 U.S. 690.[7]

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[6] It appears that petitioner is a Portuguese with little or no knowledge of the English language (R. 29). However, no question is raised by petitioner as to the competency of the interpreter or that the investigator's words were not properly interpreted to him (R. 8).

[7] *Wood* v. *United States,* 128 F. 2d 265 (C. A. D. C.), upon which petitioner relies (Pet. 5-6), is clearly distinguishable, for there the defendants were required to enter a plea upon preliminary hearing before the magistrate. Here, on the other hand, as we have shown, petitioner was told that he was not required to make any statement. Moreover, the statement has not been used against him. The statement in *Petition of F.,* 73 F. Supp. 655 (S. D. N. Y.), upon which petitioner also relies (Pet. 5), is a dictum.

Finally, although we have found no cases directly in point, petitioner's objection, based upon the failure of the investigating officer to advise petitioner that he could seek counsel before making any statement, would seem to be equally without support in law. Cf. *Wilson* v. *United States,* 162 U.S. 613, 616, 624. So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid examination in private of those in lawful custody or the use as evidence of information voluntarily given. *United States* v. *Carignan,* 342 U.S. 36, 39; *McNabb* v. *United States,* 318 U.S. 332, 346; *Lisenba* v. *California,* 314 U.S. 219, 239; *Ziang Sung Wan* v. *United States,* 266 U.S. 1, 14. It does not appear that petitioner's statement, rendered during his legal custody in connection with deportation proceedings, was otherwise than voluntary.[8]

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[8] The *McNabb* rule, which petitioner also invokes (Pet. 6-8), is clearly inapplicable for petitioner was lawfully in custody under the deportation warrant. *United States* v. *Carignan, supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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